ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant To Section 706 of the Telecommunications Act of 1996	GN Docket No 04-54

REPLY COMMENTS OF NEXTG NETWORKS, INC.

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Pursuant to the Public Notice released April 16, 2004, NextG Networks, Inc ("NextG") submits the following Reply Comments regarding the Commission's inquiry into barriers to deployment of advanced telecommunications capability, and specifically, NextG replies to the Comments of the National Association of Telecommunications Officers and Advisers ("NATOA") And The Alliance for Community Media ("NATOA Comments").

I. SUMMARY OF NEXTG'S SERVICE AND NEED FOR ACCESS TO THE PUBLIC RIGHTS-OF-WAY

NextG is at the cutting edge of the provision of telecommunications services using advanced technologies and capabilities Specifically, NextG has invented and developed a new wireless network architecture and associated telecommunication service offering based on using fiber-optic cable and small antennas mounted in the public rights-of-way (ROW), on infrastructure such as lamp posts and utility poles Using this fiber network and ROW infrastructure, NextG Networks has effectively "split" a traditional cell site, keeping only the necessary pieces in the remote antenna location, and allowing the rest of the cell site equipment to be placed in a centralized facility.

NextG Networks offers a metro telecommunications service offering that is based on the use of fiber-optic cables to transport radio frequency (RF) signals to small antennas mounted in the public ROW. This "RF-transport" telecommunications service, takes wireless spectrum from a microcellular optical repeater unit or switch location, and converts the spectrum into an optical signal This signal is then transported to multiple locations within a metro area using fiber optics. The transport is very efficient because the fiber bandwidth is sufficient to support multiple antennas, protocols, and service offerings over a single strand of fiber. In fact, much of the NextG proprietary technology focuses on the techniques for creating this high capacity spectrum pipe that can be shared by multiple services. From the remote locations, the fiber transports the signals to a centralized

switching location From there, the signals are transported back out to remote antenna locations or alternatively to public telecommunications networks.

At the remote location where the antenna is located, the optical signal is converted back into a radio signal and delivered to a small antenna for broadcast. The RF-to-optical conversion is done by a small unit located near the remote antenna.

In addition to providing better coverage, capacity and bandwidth versus traditional networking schemes, the NextG service is unique in several other ways. First, the antenna locations are "agnostic" to the protocol and service that is being transported to the antenna. Second, as capacity grows on the network, the cells can easily be "split" by simply re-cabling the connections at the centralized switch location to add additional sectors. This is in contrast to traditional networks, where cell splitting requires intensive planning and re-optimization of the network as new sites are added Also, having all of the network capacity served from one location (the central switch) allows network maintenance to be centrally located, thereby reducing costs Third, as a result of the trunking efficiency of centrally processing traffic from different locations, there are fewer network resources required to serve a given amount of traffic when compared with the traditional network architecture This is because in the traditional architecture, each cell site must be designed to support the maximum capacity of that area. In the NextG centralized case, only the peak demand of the entire network must be considered. Finally, by feeding remote antennas from a centralized facility, up-grades to new frequency bands or protocols are easier to deploy and cost less, since the new technology is simply introduced at one location

The NextG telecommunications service and associated network solution is dependent on the ability to deploy a uniform grid of low antennas in a metropolitan area In theory, wireless antennas can either be placed on private property (buildings), or on public ROW infrastructure (utility poles

and street lamps) For the traditional "high site" architecture, private property may provide a good solution because the buildings are tall, and since each antenna covers a lot of area, there are many candidate buildings to serve an area However, the NextG service offering requires a contiguous grid of low antenna sites to be deployed with no gaps in the service area Accordingly, access to public ROW infrastructure is a necessity to create this network. Private property is not a viable solution for several reasons, including

- Antenna Height As mentioned above, NextG's service requires "low site" antennas at a height of approximately 30 feet or less (which is significantly lower than the height of traditional wireless devises at greater than 100 feet)
- No ubiquitous coverage There are many intersections where there are no suitable candidates, or there are no willing landlords. This is a major consideration as the NextG solution requires a contiguous grid of antenna sites close to each other.
- Economic feasibility In many locations, even if the landlord is willing to allow an antenna site, the terms of the lease are such that the service offering from NextG (or anyone else) would be financially nonviable There is also the practical issue that due to the increased number of sites required in the NextG architecture, the rates demanded by landlords on a per site basis would make the entire network concept economically infeasible.
- Radio frequency (RF) safety. Traditional private property sites are mounted on rooftops away from the tenants in a building. Mounting low antenna sites on the sides of buildings (just on the other side of the wall from residences) would in many cases create radio frequency radiation levels within the building that would exceed FCC mandated levels for human exposure

II. NEXTG HAS ENCOUNTERED SIGNIFICANT BARRIERS TO ENTRY IN NEW YORK CITY AND ELSEWHERE

In its Comments, NATOA asserts that local governments have used innovative solutions to bring broadband to the community, and cites as support for the assertion the City of New York's February 9, 2004 "Request For Proposals For Franchise For The Installation And Use, On City-Owned Street Light Poles, Traffic Light Poles And Highway Sign Support Poles, Of Telecommunications Equipment And Facilities, Including Base Station And Access Point Facilities, In Connection With The Provision Of Mobile Telecommunications Services" ("NYC RFP") (NATOA Comments at 3)

NATOA's citation to the NYC RFP as an example of local government "facilitating" the deployment of broadband is remarkable First, NATOA fails to tell the Commission that NextG has filed a complaint in the federal District Court for the Southern District Of New York, alleging, among other things, that the NYC RFP, on its face, violates Section 253 of the Telecommunications Act. (A copy of NextG's First Amended Complaint is attached hereto as Exhibit 1.) As NextG's Complaint and Motion For Preliminary Injunction (copies of NextG's Preliminary Injunction briefs are attached hereto as Exhibits 2 & 3) demonstrate, the NYC RFP, on its face, is in direct conflict with the mandates of Section 253, and particularly, the binding ruling of the Second Circuit in *TCG New York, Inc v City of White Plains*, 305 F.3d 67 (2d Cir 2002), *cert denied*, 123 S Ct 1582 (2003) As even the most summary review of the NYC RFP reveals, it is not an "innovative solution" to advance the development of telecommunications capabilities, but rather the City of New York's attempt to control telecommunications market entry through an auction to the highest bidder of the exclusive right to use the public rights-of-way As such, it is precisely the type of unfettered discretion and third tier of regulation that the Commission and the courts have held to constitute barriers to entry under Section 253. *See, e g ,*

White Plains, 305 F 3d at 76, 82, *City of Auburn v Qwest Corp* , 260 F 3d 1160 (9th Cir 2001), *cert denied*, 534 U S 1079 (2002), *TCI Cablevision of Oakland, Inc* , 12 FCC Rcd 21396, ¶ 102 (1997), *New Jersey Payphone Ass'n, Inc v Town of West New York*, 299 F 3d 235 (3d Cir. 2002).

Second, as NextG's Complaint explains, the City of New York has delayed NextG's ability to provide telecommunications services for over two years. Indeed, the City refused to even accept, much less grant, NextG's application in June 2002 to use the public rights-of-way. (Complaint ¶¶ 93-94). Again, these facts belie NATOA's picture of the City of New York as a shining example of "innovative solutions" or local government "facilitating" deployment of advanced telecommunications capabilities In NextG's experience, the City of New York is an example of the worst type of burdensome and overbearing third tier of regulation that has little or nothing to do with legitimate management of the public rights-of-way and everything to do with the City's manipulation of its control over essential rights-of-way to seek unreasonable compensation (one could say "monopoly rents").[1]

III. CONCLUSIONS AND RECOMMENDATIONS

Unfortunately, NextG's experience in New York City is not entirely atypical, and NATOA's citation to it suggests that the reality behind all of their citations may be significantly different than the spin that NATOA is trying to advance. Despite the eight years since the adoption of Section 253, and the now clear weight of judicial precedent declaring the significant

[1] In a letter issued after the RFP, the City has clarified that it demands a minimum annual payment of $3,000 per pole (plus an annual general payment of at least $100,000) for access to street light poles in the public rights-of-way in Manhattan (A copy of the City's letter is attached hereto as Exhibit 4) Given that NextG could purchase and install its own poles for approximately $5,000 per pole (if the City did not prohibit it from doing so), it is clear that the City's demanded minimum bid is an unlawful abuse of the City's monopoly control over the public rights-of-way

limits imposed on local government by Section 253, NextG has encountered too many situations where local authorities impose unreasonable and clearly unlawful requirements as a condition of entry NATOA asserts that there is no such problem, asserting that there are only three petitions to the Commission regarding right-of-way disputes (NATOA cmts. at 2). Yet, that is inaccurate and misleading. First, the Commission's NOI only cites the "pending" actions currently before the Commission, not all Section 253 cases ever filed As such, it ignores the dozens of Section 253 cases concerning access to rights-of-way that have been addressed by federal and state courts (and it certainly ignores the many more that are currently pending, or were either unreported or settled) [2] And second, neither NextG nor any other business could possibly litigate (either to the Commission or the courts) every time a local government imposes a roadblock to deployment. The facilities would not get built, and precious resources would be diverted to litigation instead of service and network development.

The Commission has recognized that

> Section 253 is a critical component of Congress' pro-competitive deregulatory national policy framework that it put into place by enacting the 1996 Act. As we have noted, "Congress intended primarily for competitive markets to determine which entrants shall provide telecommunications services demanded by consumers, and by preempting under section 253 sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals "

TCI Cablevision of Oakland, 12 FCC Rcd 21396, ¶ 102 (internal footnotes omitted) The NYC RFP and NATOA's comments demonstrate that local government has not gotten that message Wrapping themselves in the artificial banner of "managing the rights-of-way," local governments still seek to impose themselves as the ultimate gatekeepers and toll-takers in the deployment of

[2] At least 36 separate cases raising claims under Section 253 for access to public rights-of-way have had at least a single published opinion. Several cases have involved multiple decisions, reflecting various procedural stages (*e g* , preliminary injunction, summary judgment, etc), and as such, there are over seventy published decisions addressing access to rights-of-way and

advanced telecommunications services and facilities The need for public rights-of-way management, while legitimate, is narrow. *City of Auburn*, 260 F.3d at 1180 (rejecting cities' claims that regulations were related to rights-of-way management, as "semantic two-step" under which "the safe harbor provisions would swallow whole the broad congressional preemption") The Commission needs to re-emphasize that the policy of the Communications Act, as expressed in Section 253, is for markets, not local government regulators, to dictate or in any way influence the deployment of telecommunications capabilities and services.

Contrary to NATOA's assertions, the Commission has jurisdiction over this issue, both under Section 253 and under Section 706 Indeed, the Commission's jurisdiction is established, and need not be debated further What NextG asks is that the Commission, at a minimum, use its powers under Section 706 to declare that local government overreaching can and does stand as an impediment to the deployment of advanced telecommunications facilities and services, and resolve to act expeditiously on any petition for preemption filed under Section 253.

Section 253

Respectfully Submitted,

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